

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	Criminal Action
)	No. 04-CR-00274
vs.)	
)	
ALEXANDER M. INTROCASO,)	
)	
Defendant.)	

* * *

APPEARANCES:

SETH WEBER, A.U.S.A

ANDREW K. PARKER, ESQUIRE
On behalf of Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on three defense motions: 1) defendant's Motion to Suppress and Return of Evidence filed by defendant on July 16, 2004; 2) defendant's Motion in Limine to Exclude Evidence Seized by and from the Custody of the Sheriff of Lehigh County, Pennsylvania filed on July 19, 2004; and 3) defendant's Motion in Limine and Memorandum to Exclude Evidence and Quash the Faulty Indictment Related Thereto as Seized by and from the Custody of the Sheriff of Lehigh County, Pennsylvania and Made Subject to Indictment under Federal Law

filed by defendant on July 21, 2004.¹ On September 23 and 24, 2004 a hearing was conducted before the undersigned on all three motions.² Closing argument was conducted before the undersigned on November 10, 2004. For the reasons set forth below we deny defendant's motions.

FACTS

Based upon the Indictment, record papers, affidavits, exhibits, witness testimony, defendant's motions, the government's responses, the briefs of the parties and after hearing conducted before the undersigned September 23 and 24, 2003,³ the pertinent facts are as follows.

¹ The government filed the following responses on July 21, 2004: Government's Response in Opposition to Defendant's Motion to Suppress Evidence and Government's Response in Opposition to Defendant's Motion in Limine to Exclude Evidence. On July 27, 2004 the government filed Government's Response in Opposition to Defendant's Motion in Limine to Exclude Evidence and to Quash Faulty Indictment.

² The undersigned also addressed two additional motions at the start of the hearing.

The first was a motion on remand to the United States District Court for the Eastern District of Pennsylvania from the United States Court of Appeals for the Third Circuit. The motion was an Application for Writ of Habeas Corpus that defendant filed in the Third Circuit on September 13, 2004. By Order dated September 14, 2004, the Third Circuit denied the application, noting that it appeared to be an untimely bail motion and remanding the matter to this court for consideration. The undersigned heard argument from both sides and denied the Application for Writ of Habeas Corpus on September 23, 2004. The court stated its reasons on the record for denying this motion. Hearing Transcript ("N.T.") September 23, 2004 at pages 22 through 34.

The second additional motion was defendant's Motion to Require Response to Discovery Demand filed September 14, 2004. Defendant asked to withdraw the motion at the beginning of the hearing on September 23, 2004, and the undersigned granted that request.

³ During the hearing, defendant offered nine exhibits and the government offered 10 exhibits. Defendant presented the testimony of five witnesses, including defendant. The government offered four witnesses. By agreement of the parties, the testimony of defendant's wife, Samia Introcaso,

(Footnote 3, continued):

On February 2, 2004, Defendant's wife, Samia Introcaso, obtained a Protection From Abuse (PFA) Order against defendant from the Lehigh County Court of Common Pleas. The Order barred defendant from the residence that he was leasing and in which he and his wife were residing. It also required him to "immediately relinquish" all weapons to the Sheriff's Office.⁴

On February 2, 2004, several Lehigh County Sheriff's deputies went to defendant's house to enforce the PFA Order. Deputy Sheriff Mark R. Jarrouj spoke with Mrs. Introcaso. He asked her questions in English and she answered the questions in English. The Defendant's wife admitted the deputies into the residence.

The deputies explained the court Order to Mrs. Introcaso and told her they were there to enforce the Order. She then escorted the deputies from room to room throughout the house, identifying the locations of defendant's weapons. She provided the deputy sheriffs with keys to locked storage areas, enabling them to retrieve weapons stored within them.⁵

(Footnote 3, continued):

which the court heard with the assistance of an Arabic translator on June 22, 2004 as part of the court's hearing on defendant's motion for pre-trial release, was included into evidence as part of the hearing on the three motions currently before the court.

⁴ Protection from Abuse Order entered February 2, 2004 by the Honorable Carol K. McGuinley of Lehigh County Court of Common Pleas. Hearing Defense Exhibit 2; Government Exhibit 1.

⁵ N.T., September 24, 2004, at 91, 94-95.

As a result of this search, the deputies seized 23 firearms (both handguns and rifles), a machete, 21 knives and seven swords. One of the firearms seized, an unregistered sawed-off shotgun⁶, is the subject of count one of the Indictment. The deputies found, but did not seize, hundreds of pounds of ammunition.

On or about February 8, 2004, Joanie Tedesco, a friend of Mrs. Introcaso, telephoned the Lehigh County Sheriff's Office on behalf of defendant's wife, asking the Sheriff's to retrieve additional weapons. She asked the Sheriff's Department to remove the weapons.

The Deputy Sheriffs arrived at the house on February 9, 2004. The deputies informed Mrs. Introcaso that they would not search the house without her signing a consent form. They also told her she was not required to sign the form. She signed the form and directed them to the weapons which she had recently discovered.

As a result of this search, the deputies seized six firearms (a Thompson machine gun, an M14 rifle with scope, a 9 millimeter pistol, another rifle and two handguns).

During this search, Mrs. Introcaso directed the deputies to a locked cabinet. She was unable to find her keys to the cabinet. She consented to the deputies breaking the lock to

⁶ The Government referred to the unregistered weapon as a "sawed-off shotgun." Defendant referred to it as a "short-barrel shotgun."

the cabinet. The deputies used bolt cutters to open the lock.

Within the cabinet the deputies found ammunition cans which contained cans of smokeless powder and a coil of hobby fuse used in explosives. Additionally, the cabinet contained three live hand grenades. The hand grenades and the components for explosive devices are the subject of count two of the Indictment.

PROCEDURAL HISTORY

On April 13, 2004, the government filed a Complaint under seal against defendant. Defendant was arrested pursuant to an arrest warrant issued by United States Magistrate Judge Arnold C. Rapoport on April 13, 2004, and brought before Judge Rapoport for his initial appearance the same day.

The government filed a motion for pretrial detention on April 14, 2004. On April 15, 2004, Magistrate Judge Rapoport conducted a hearing and oral argument on the motion. At the conclusion of that hearing, Judge Rapoport ruled that defendant was a danger to the community and ordered defendant's pretrial detention and a psychological evaluation.

On June 15, 2004, defendant filed a motion for release on personal recognizance. On June 17, 18, and 22, 2004, the undersigned conducted undersigned hearing on this motion. The court determined that defendant was a danger to the community,

and denied the motion, providing its reasons on the record.⁷

On July 1, 2004, defendant filed a motion for reconsideration of the court's June 22, 2004 Order. On July 14, 2004 the court denied this motion.

Defendant was charged in a two-count Indictment filed on May 13, 2004. Count one alleged that defendant violated 26 U.S.C. §§ 5861(d), 5845(a) and 5871 by knowingly possessing an unregistered firearm. Count two alleged a violation of 26 U.S.C. §§ 5861(d), 5845(a) and 5871 for knowingly possessing three unregistered hand grenades. Defendant plead not guilty to both counts at his arraignment before Magistrate Judge Rapoport on June 9, 2004.

On June 14, 2004, this court entered an Order requiring pre-trial motions to be filed by June 24, 2004, and establishing a hearing date of July 7, 2004 for all motions. No motions were filed by this deadline. On June 28, 2004, in the absence of any filed motions, the July 7, 2004 hearing was stricken.

The case was attached for trial to begin on July 20, 2004. On July 16, 2004, defendant filed a Motion to Suppress and Return of Evidence. On July 19, 2004, the court denied this motion as being untimely.

In the days preceding the trial, defendant filed two

⁷ N.T., June 22, 2004 at 54-56.

additional motions. On July 19, 2004, defendant filed a Motion in Limine to Exclude Evidence Seized by and from the Custody of the Sheriff of Lehigh County, Pennsylvania. On July 21, 2004, defendant filed a Motion to Exclude evidence and Quash the Faulty Indictment Related Thereto as Seized by and from the Custody of the Sheriff of Lehigh County, Pennsylvania and Made Subject to Indictment under Federal Law. The government has responded to both motions.

On July 22, 2004, the case proceeded to the jury-selection phase. Prior to jury selection, defendant requested a continuance of the trial to permit a hearing on his motions to be scheduled. In conjunction with this request, defendant waived his speedy-trial rights. The court granted defendant's request. A hearing on the untimely motions⁸ was scheduled for September 23 and 24, 2004, and the trial was rescheduled for December 6, 2004.

⁸ The untimeliness of these motions would provide sufficient basis for their denial. Federal Rule of Criminal Procedure 12(b)(3) requires a defendant to raise before trial "a motion alleging a defect in instituting the prosecution" and "a motion to suppress." Local Rule of Criminal Procedure for the Eastern District requires Rule 12 motions to be filed within ten days after arraignment. Defendant was apprised of this deadline at his arraignment on June 6, 2004. The government also notes that defendant was given additional time, until June 26, 2004, to submit motions. Nevertheless, at defense counsel's request, we heard and decided the motions on their merits.

DISCUSSION

Motion to Suppress and Return of Evidence

Defendant makes four arguments in support of his Motion to Suppress and Return of Evidence, filed July 16, 2004. First he argues that the evidence obtained during the February 9, 2004 search should be precluded because the search violated the Fourth Amendment to the United States Constitution.⁹ Second, defendant argues that the evidence obtained on February 9, 2004 should be excluded because the property was obtained by the Lehigh County Sheriff pursuant to the PFA Order and, therefore, the Federal authorities lack jurisdiction and possessory rights while the items remained in the custody of the Sheriff.

Third, defendant contends that count one of the Indictment must be dismissed because it violates the ex post facto provisions of the United States Constitution. Fourth, defendant asserts that count two must be dismissed because Section 5845 of Title 26 of the Internal Revenue Code, upon which defendant was indicted, does not apply to individuals such as the defendant who are not importers, manufacturers or dealers of weapons.

The government disputes each of defendant's claims. We address these arguments in order below.

⁹ Defendant does not challenge the legality of the February 2, 2004 search at which the unregistered shotgun was seized. Rather, defendant's arguments are limited to the February 9, 2004 search at which the three hand grenades were seized.

Defendant's Fourth Amendment argument is multi-fold. Defendant argues that warrantless searches and seizures inside a home are presumptively unreasonable. United States v. Acosta, 965 F.2d 1248 (3rd Cir. 1992). Defendant contends that there were no exigent circumstances to legitimize the warrantless search on February 9, 2004. Defendant also argues that Mrs. Introcaso's limited knowledge of English prevented her from being capable of consenting to the search.

Defendant notes that in testimony before this court on June 22, 2004, Mrs. Introcaso testified that she did not know what the forms were that she signed. She also testified that she felt intimidated and threatened by the police officers. Defendant argues that she speaks and reads Arabic, that she cannot read English, and that she speaks only limited English, and thus was not able to offer her consent.

Additionally, defendant argues that his wife lacked the authority to consent to the search of his property, specifically the locked basement cabinet. Based on these arguments, defendant asks the court to suppress the evidence obtained in the February 2, 2004 search.

The government argues that proper consent is an exception to the requirement for a search warrant. The government also maintains that Mrs. Introcaso understood English sufficiently to give proper consent. The government contends

that Mrs. Introcaso had actual authority to consent to the search of the house or that, alternatively, she had apparent authority to do so. For the following reasons, we agree with the government.

A warrantless search is constitutionally permissible if a "specifically established and well-delineated exception" applies. Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290, 299 (1978). "Proper consent voluntarily given" is one of the established exceptions. United States v. Matlock, 415 U.S. 164, 165, 94 S.Ct. 988, 990, 39 L.Ed.2d 242, 246 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

In the instant case, defendant objects to the second search which occurred on February 9, 2004. There is no question that consent was given for this search. Mrs. Introcaso signed a consent to search form upon which the officers relied in searching the premises. At issue is whether this consent was voluntarily and understandingly given.

In analyzing whether consent is voluntarily given, the court must examine the totality of the circumstances surrounding the consent, in particular: (1) knowledge of the right to refuse consent; (2) age, intelligence, education and language ability; and (3) the degree to which the individual cooperates with the police. Schneckloth, supra; United States v. Thame, 846 F.2d 200

(3rd Cir. 1988). The government bears the burden of establishing that a warrant exception applies. United States v. Herrold, 962 F.2d 1131, 1137 (3d Cir. 1992).

Each of these elements is satisfied in this case. Upon their arrival at the residence, the deputies discussed with Mrs. Intracaso their reason for being there. They discussed the contents of the consent form and informed her that she did not have to consent to the search of the house.

The record indicates that Mrs. Introcaso was cooperative with the deputy sheriffs. The deputies arrived because of a telephone call on behalf of Mrs. Introcaso asking them to retrieve some additional weapons that were in the house. When they arrived, Mrs. Introcaso signed the consent form and invited them into the house. In United States v. Hampton, 260 F.2d 832, 835 (8th Cir. 2001) the Eight Circuit Court of Appeals found that consent was voluntary when defendant opened the door to let the police in. In United States v. Butler, 102 F.3d 1191, 1197 (11th Cir. 1997) the Eleventh Circuit Court found a consent to search voluntary where a person opened the door and signed a consent form.

Mrs. Introcaso lead the deputy sheriffs from room to room, identifying locations where weapons were stored and providing keys to deputies to open locked areas. In United States v. Glover, 104 F3d 1570, 1584 (10th Cir. 1997) the Tenth

Circuit Court found consent voluntary where defendant told officers where specific items were located within the house and also provided keys to locked areas. Mrs. Introcaso also asked the deputies to open the locked basement cabinet in which the hand grenades were found. Her conduct demonstrated significant cooperation with the sheriffs.

We disagree with defendant's argument that Mrs. Introcaso's limited English proficiency necessarily precludes her from providing valid consent. The record indicates that Mrs. Introcaso was a competent, intelligent adult. Although her English skills were limited, she was sufficiently proficient in English to be able to discuss with the deputy sheriffs their reasons for being there, and to direct them throughout the house. United States v. Zubia-Melendez, 263 F.3d 1155 (10th Cir. 2001); United States v. Zapata, 180 F.3d 1237 (11th Cir. 1999).

Deputy Sheriff Mark R. Jarrouj testified that he spoke with Mrs. Introcaso when he arrived on February 2, 2004 to retrieve the weapons. He testified that they conversed in English, that she understood his questions to her that were given in English and that she answered the questions using English.¹⁰ We found Deputy Sheriff Jarrouj's testimony credible.

We similarly find credible the testimony of Detective Sergeant Kenneth C. Hilbert of the Lehigh County District

¹⁰ N.T., September 24, 2004, at 94-95.

Attorney Criminal Investigation Division who testified that he conversed with Mrs. Introcaso in English on February 9, 2004. He testified that he informed her that the officers came in response to the phone call, but that she had the right to not have the house searched. He testified that he read her the consent form and that she signed it.¹¹

We also find credible the testimony of Chief Detective Alfred W. Steckel of the District Attorney's Criminal Investigation Division who testified to being present during the conversation between Detective Sergeant Hilbert and Mrs. Introcaso prior to the February 9, 2004 search. Chief Detective Steckel testified that while Mrs. Introcaso spoke broken English, she did speak English and she was able to converse with Detective Sergeant Hilbert.¹²

Under these circumstances, we conclude that the consent was voluntarily given. As such, this case falls within the warrantless search exception.

Defendant also argues that Mrs. Introcaso lacked authority to consent to the search of the storage container in the basement in which the hand grenades were found. We disagree. Mrs. Introcaso had common authority over the property with her husband, which enabled her to consent to search of the areas that

¹¹ N.T., September 24, 2004, at 112-114.

¹² N.T., September 23, 2004, at 95-96.

were searched. Common authority rests in each person whose mutual use of the property demonstrates "joint access or control for most purposes." United States v. Matlock, 415 U.S. 164, 171, n.7, 94 S.Ct. 988, 993, 39 L.Ed.2d 242, 250 (1974).

The law presumes that other users of property have assumed the risk that areas under common control can be searched. Matlock, 415 U.S. at 171-72, 94 S.Ct. at 993, 39 L.Ed.2d at 249-250. Under the PFA order, although defendant retained an ownership interest in the weapons, he no longer had the right to possess or control them. Having been evicted by that Order, he also had no right to occupy the real estate. Therefore, as a consequence of the PFA Order, Mrs. Introcaso alone had legal possession and control of the residence and the weapons therein.

Alternatively, the government argues that Mrs. Introcaso had apparent authority to consent to the search. See Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2 148 (1990); United States v. Morales, 861 F.2d 396, 399-401 (3rd Cir. 1988). We agree.

A warrantless search is valid, even if the person offering consent lacks actual authority to consent to the search, where the police reasonably believe the person had authority consent. A law enforcement officer's belief is

"judged against an objective standard: would the facts available to the officer at the moment ... 'warrant a man of reasonable caution in the belief'" that the consenting

party had authority over the premises?

Rodriguez, 497 U.S. at 188, 110 S.Ct. at 2801, 111 L.Ed.2 148, 161. (Citation omitted.)

In this case, at a minimum, Mrs. Introcaso had apparent authority to consent to the search. The deputies relied in good faith on that apparent authority. Their reliance was reasonable. They were at the house to remove weapons pursuant to the terms of a valid Common Pleas Court Order. Mrs. Introcaso sought the PFA Order, so it would be reasonable to assume she wanted the weapons removed. Additionally, it would reasonably appear to law enforcement officers that the telephone call which prompted the second search on February 9, 2004 was made at Mrs. Introcaso's behest for the same reasons Mrs. Introcaso initially sought the PFA Order.

The second of defendant's four arguments is that the evidence obtained on February 9, 2004 should be precluded because the property was obtained by the Lehigh County Sheriff pursuant to the state PFA Order and therefore Federal authorities lacked jurisdiction and possessory rights while the items remained in the custody of the Sheriff. Defendant cites no authority in support of this argument other than a single case which is cited for the general proposition that evidence obtained through an illegal search must be excluded. Nardone v. United States, 208 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266 (1939).

In response, the government argues that the evidence seized pursuant to the PFA Order does not violate the Fourth Amendment. The government argues that if a valid administrative search discloses evidence of criminal activity, the evidence may be seized and used in separate criminal proceedings. Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984). The government cites several cases in which contraband found during a valid administrative search may be used in a criminal trial.

In United States v. Thomas, 973 F.2d 1152, 1156 (5th Cir. 1992) the Fifth Circuit Court found that vehicle license plates and identification numbers found during an administrative search of junkyard property may be used in a criminal trial. In United States v. Branson, 21 F.3d 113, 118 (6th Cir. 1994) the Sixth Circuit Court found that marijuana found during an administrative search of an auto repair shop could properly be used in a criminal trial.

The government notes that in the current case the search was conducted pursuant to a court Order authorizing seizure of the weapons because of the threat of violence to defendant's wife by defendant. The seizure of weapons did not exceed the scope of the Sheriff's valid administrative search that was made pursuant to the February 2, 2004 court Order. The government contends that there is no violation of the Fourth

Amendment when the search and seizure is made pursuant to a prior judicial determination. We agree.

Defendant essentially asks this court to preclude state or local officials from forwarding evidence of criminal conduct to appropriate federal criminal officials. We see no basis for allowing such a preclusion, and defendant offers no meaningful argument in support of such a preclusion. In the absence of legal authority for defendant's position, we find persuasive the government's reliance on administrative search cases. Officials are not required to turn a blind eye on contraband material discovered while the officials are conducting a search within the scope of their lawful authority. Accordingly, we reject defendant's argument.

Defendant's third argument in his first motion is that the government is precluded under the ex post facto provisions of the United States Constitution¹³ from applying 26 U.S.C. § 5861(d). Under this provision,

It shall be unlawful for any person ...

(d) to receive or possess a firearm
which is not registered to him in the
National Firearms Registration and
Transfer Record[.]

Defendant's argument is that the shotgun was in his family prior to the enactment of this statutory provision in

¹³ U.S. Const., Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.

1968.¹⁴ Defendant argues that

What was once legal is not by act of the United States Attorney's Office in this case, classified as not legal, making it a crime for defendant to be in possession of the antique firearm. This is an *ex post facto* application of Title 26 of the Internal Revenue Code

Motion to Suppress and Return of Evidence, page 11. We disagree.

For a law to violate the *ex post facto* provision, it "must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 519 U.S. 433, 441, 117 S.Ct. 891, 896, 137 L.Ed.2d 63, 72 (1997). An *ex post facto* law is one which renders an act punishable in a manner which it was not punishable when it was committed. Fletcher v. Peck, 6 Cranch 87, 138 (1810).

In the current case, defendant is not being charged for any conduct that occurred prior to the enactment of 26 U.S.C. § 5861(d). Rather, defendant is being charged for conduct that occurred after enactment of the law, ownership of the shotgun in 2004 without appropriate registration. Accordingly, there is no merit to defendant's *ex post facto* argument.

Defendant's fourth and final argument in his first

¹⁴ Defendant does not raise *ex post facto* arguments as to the application of this provision to the hand grenades.

motion is that the Indictment is faulty because title 26 of the Internal Revenue Code, under which defendant was indicted, does not apply to individuals such as defendant who merely possess firearms, but only applies to importers, manufacturers or dealers of firearms.¹⁵ In support of his argument, Defendant relies on 26 U.S.C. § 5841(b) which identifies what parties must register:

(b) By whom registered. Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm *transferred* shall be registered to the transferee by the transferor.
(Emphasis added.)

Defendant argues that the terms "manufacturer, importer and maker" must be read into this provision after the word transferred, seemingly because those terms alone are used in the preceding sentence of the provision. Defendant also refers to 26 U.S.C. § 5861 which addresses prohibited acts. As discussed earlier in this opinion, Section 5861 provides that:

It shall be unlawful for any *person* ...

(d) to receive or possess a firearm which is not registered to *him* in the National Firearms Registration and Transfer Record[.]

26 U.S.C. § 5861. (Emphasis added.)

Defendant argues that the terms "importer, manufacturer

¹⁵ This argument is also repeated in the July 19, 2004 motion. By way of background we note that Chapter 53 of Title 26 applies to "Machine Guns, Destructive Devices and Certain Other Firearms". Subchapter B, Part I of Chapter 53 addresses general provisions of the law. Section 5841 is the first section of Subchapter B, Part I. Subchapter C of Chapter 53 is titled "Prohibited Acts". Section 5861 forms the entirety of Subchapter C.

and dealer" must be read into the language following the terms "person" and "him". Defendant seems to draw this inference from the language of Section 5841, specifically, that the term "person" is not used in this section, such that the registration provisions are only applicable to the three delineated categories of "importer, manufacturer and dealer."

In response, Government argues that these provisions of Title 26 at issue must be read in conjunction with the federal rules of construction in 1 U.S.C. § 1. This section provides that:

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

* * * *

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

The government cites a Sixth Circuit Court of Appeals case which provided that:

the National Firearms Act, codified at 26 U.S.C. § 5801 *et seq.*, prohibits individuals from receiving or possessing a firearm that is not registered in the National Firearms Registration and Transfer Record. See 26 U.S.C. § 5861(d). The registration works hand-in-glove with taxes that the statute imposes on the transfer and manufacture of firearms covered by the Act.

United States v. Thompson, 361 F.3d 918, 920 (6th Cir. 2004).

We agree with government's argument. Title 18 U.S.C. § 1 provides a default definition for the term person, noting that the meaning of the term can be modified if the context of the term, as it is used in the specific statutory provision at issue, suggests otherwise. The context of 18 U.S.C. § 5841(b) does not suggest otherwise. We find persuasive the rationale of the Sixth Circuit Court of Appeals in the Thompson case. Accordingly, we deny defendant's argument that the indictment is faulty.

Motion in Limine to Exclude Evidence Seized by the Sheriff

In his Motion in Limine to Exclude Evidence Seized by and from the Custody of the Sheriff of Lehigh County, Pennsylvania, filed July 19, 2004, defendant essentially repeats issues one, three and four from the from the July 16, 2004 motion to suppress, albeit in a summary form. For the reasons expressed above, we deny the warrantless search, ex post facto, and internal revenue code arguments raised in the July 16, 2004 motion and raised again in the July 19, 2004 motion.¹⁶

¹⁶ Defendant also raises in this motion what seems to be a request for return to his possession of the firearms retrieved during the February 2 and February 9, 2004 searches. As the PFA Order which authorized retrieval of these weapons is no longer in effect, but for defendant's continued incarceration, he may indeed be entitled to possession of the weapons that are not at issue in this case. However, as defendant was detained at the time the motion was made, and as defendant has been continuously detained since that time, the request for possession of the weapons is moot. (Defendant, while incarcerated certainly may not receive possession of the weapons.) Defendant is at liberty, at an appropriate time, after his release from custody, to seek from the proper authorities return of the weapons still within their custody.

Motion to Quash the Indictment

In his Motion in Limine and Memorandum to Exclude Evidence and Quash the Faulty Indictment Related Thereto as Seized by and from the Custody of the Sheriff of Lehigh County, Pennsylvania and Made Subject to Indictment under Federal Law, filed by defendant on July 21, 2004, defendant argues that, under 18 Pa.C.S.A § 6111.4, Pennsylvania citizens do not need to register firearms.

Section 6111.4 of the Pennsylvania Crimes Code provides in pertinent part,

6111.4 Registration of Firearms

Notwithstanding any section of this chapter to the contrary, nothing in this chapter shall be construed to allow any government or law enforcement agency or any agent thereof to create, maintain, or operate any registry of firearm ownership within this Commonwealth....

18 Pa.C.S.A § 6111.4.

Defendant notes that Title 26 of the Internal Revenue Code conflicts with this Pennsylvania provision. Defendant argues that because Pennsylvania law prohibits the Commonwealth or any government agency from maintaining a firearms registry, that he cannot be guilty under 26 U.S.C. § 5861(d), quoted above, of the federal crime of possessing a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

Defendant also notes that his indictment was for "possession of unregistered" weapons. Defendant argues that, at the time of his arrest on April 13, 2004, he was not in possession of the weapons. Rather, the Lehigh County Sheriff's Department was in possession of the weapons. Additionally, as noted above, her argues that, under Pennsylvania law, he was not required to register the weapon. Accordingly, he seeks dismissal of the Indictment.

In response, the government argues that defendant's argument is contrary to the Supremacy Clause of the Constitution of the United States.¹⁷ The government maintains that any state restriction on the federal government's power to prosecute criminal offenses is invalid under the Supremacy Clause. We agree with the government's argument that the Supremacy Clause precludes defendant's argument. The Supremacy Clause of the United States Constitution provides that "the laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI., § 2.

Under the Supremacy Clause, state constitutions and statutes cannot override federal criminal statutes unless the state provisions are expressly incorporated into the applicable

¹⁷ U.S. Const., Art. VI., § 2.

federal law. United States v. Baer, 235 F.3d 561, 562 (10th Cir. 2000). In Baer, the Tenth Circuit Court of Appeals found that a state constitution cannot bar federal prosecution for violation of a federal criminal statute.

Title 26 U.S.C. § 5871 provides that:

§ 5871. Penalties.

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.

This provision clearly establishes a criminal penalty for conduct proscribed in the chapter. As discussed earlier, among the acts proscribed in the chapter is the possession of an unregistered weapon. Therefore, the requirements and prohibitions of Pennsylvania law as to whether firearms may be registered and whether Pennsylvania law enforcement agencies and officials may maintain registry databases are of no bearing in this federal case concerning violation of federal law.

In addition, the government maintains that, Supremacy Clause notwithstanding, Pennsylvania laws do not prohibit the registration of firearms. The government reasons that Section 6111.4 applies to governmental units and law enforcement agencies of the Commonwealth, and do not apply to the federal government.

We agree with the government. Section 6111.4 is a part of the Pennsylvania Uniform Firearms Act, 18 Pa.C.S. §§ 6101-

6162. Although the definitions section of this act does not define "government or law enforcement agency", it does define "law enforcement officer" as:

Any person employed by any police department or organization of the Commonwealth or political subdivision thereof who is empowered to effect an arrest with or without warrant and who is authorized to carry a firearm in the performance of that person's duties.

18 Pa.C.S. § 6102. Reading this definition in conjunction with Section 6111.4 and its reference to "government or law enforcement agency or any agent thereof", we agree with the government that Section 6111.4 is limited in scope to Pennsylvania agencies and subdivisions.

Defendant also argues in this motion that the Indictment is faulty because he did not have possession of the weapons at the time of his arrest on April 13, 2004. Defendant notes that the weapons were, at that time, in the possession of the Lehigh County Sheriff.

In response, the government argues that defendant continued to own the weapons. The government argues that possession may be direct (by actual possession) or indirect (by having the intent, and ability, to exercise dominion or control over the gun). The government asserts that defendant had such control over the weapons prior to their seizures on February 2 and 9, 2004. The government contends that it is irrelevant that

these weapons were subsequently removed and out of defendant's actual possession at the time of his arrest. We agree with the government.

Defendant acknowledges in his testimony that he was in possession of the firearm since 1980.¹⁸ In his Affidavit in Support of defendant's Motion to Suppress and Return of Evidence defendant acknowledged possessing the firearm and described where the gun was located in his house.¹⁹ Additionally, defendant acknowledged owning the container in the basement in which various items, including the hand grenades, were found.²⁰ Defendant's statements establish the necessary intent and ability to exercise dominion and control over the items charged in the Indictment. United States v. Garth, 188 F.3d 99 (3d Cir. 1999). Accordingly, we reject defendant's argument that the Indictment was faulty.

CONCLUSION

For all the foregoing reasons, we deny defendant's motion to suppress, motion to exclude evidence seized by the county Sheriff, and motion to quash the Indictment.

¹⁸ N.T., September 24, 2004, at 63-64.

¹⁹ Defendant's Affidavit in Support, July 15, 2004 at 8. See Exhibit B to defendant's Motion to Suppress and Return of Evidence.

²⁰ Defendant's affidavit at 12.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	Criminal Action
)	No. 04-CR-00274
vs.)	
)	
ALEXANDER M. INTROCASO,)	
)	
Defendant.)	

O R D E R

AND NOW, this 3rd day of December, 2004, upon consideration of the Motion to Suppress and Return of Evidence, filed by defendant on July 16, 2004; upon consideration of defendant's Motion in Limine to Exclude Evidence Seized by and from the Custody of the Sheriff of Lehigh County, Pennsylvania, filed on July 19, 2004; upon consideration of defendant's Motion in Limine and Memorandum to Exclude Evidence and Quash the Faulty Indictment Related Thereto as Seized by and from the Custody of the Sheriff of Lehigh County, Pennsylvania and Made Subject to Indictment under Federal Law, filed by defendant on July 21, 2004; upon consideration of the government's responses, filed July 21 and 27, 2004 respectively; upon consideration of the testimony and evidence presented during the hearings held on September 23 and 24, 2004; upon consideration of the closing arguments of the parties on November 10, 2004; and for the reasons contained in the accompanying Memorandum,

IT IS ORDERED that defendant's motions are each denied.

BY THE COURT:

James Knoll Gardner
United States District Judge